

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-1963

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MARBEL MENDOZA,

Petitioner,

v.

MICHAEL W. MOORE,  
Secretary, Florida Department of Corrections,

Respondent.

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REPLY TO RESPONDENT'S AMENDED RESPONSE TO  
PETITION FOR WRIT OF HABEAS CORPUS

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DAN D. HALLENBERG  
Assistant CCRC  
Florida Bar No. 0940615

NEAL A. DUPREE CAPITAL  
CAPITAL COLLATERAL REGIONAL COUNSEL  
- SOUTH  
101 N.E. 3RD AVE., SUITE 400  
Ft. Lauderdale, FL 33301  
(954) 713-1284; FAX (954) 713-1299

COUNSEL FOR PETITIONER

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## **CLAIM**

### **APPELLATE COUNSEL FAILED TO RAISE ON APPEAL NUMEROUS MERITORIOUS ISSUES WHICH WARRANT REVERSAL OF EITHER OR BOTH THE CONVICTIONS AND SENTENCE OF DEATH.**

#### **B. FAILURE TO RAISE TRIAL COURT'S ORDER PROHIBITING PETITIONER FROM PRESENTING EVIDENCE OF VICTIM'S PAST INVOLVEMENT IN "BOLITO".**

The State conceded below that the victim was arrested for bolito in 1987, which led to his plea for racketeering (TRT 786). Therefore, the victim's involvement in bolito is an established fact, not merely an allegation, as the State suggests in its response (Response at 3).

Similar to its argument in answer to Mr. Mendoza's appeal from the trial court's summary denial of his rule 3.850 motion for post-conviction relief, the State argues here that appellate counsel was not ineffective because, according to the State, the fact that the men confronted the victim in order to collect a debt and not to rob him is not a defense to attempted robbery (See State's Answer Brief in SC01-735, pp.17-8). Contrary to the State's argument, the common law claim-of-right defense to the crimes of robbery and theft has not been abrogated in Florida. Because evidence that Mr. Mendoza and the co-defendants were seeking to collect a debt owed by the victim negates the specific intent required to prove the alleged underlying offenses of attempted robbery and burglary (by negating the specific intent to commit theft), the State's argument should be rejected. Mr. Mendoza asserts and incorporates into this response by specific reference his argument on this issue set forth in the Argument section of his reply brief in case number SC01-735 (See Reply Brief in SC01-735, pp.1-8).

In discussing this issue, the State brands as "utterly ridiculous" the notion that Mr. Mendoza was acting in self-defense (State's Response at 5). The State tries to support its position by pointing to the evidence which suggested that the men had planned their confrontation with the victim. Yet, the State agreed below that the evidence failed to establish that this was premeditated murder. That the men planned ahead of time to confront the victim does not refute the fact that the victim instigated the gun fire by shooting first and that, according to Humberto's own testimony, Humberto instigated the violence by striking the victim over the head with a gun. "This was an unplanned, reactive murder that took place unexpectedly in a manner of seconds in a shootout initiated by the victim . . . In fact, it was the codefendant [Humberto] Cuellar who initiated the violence against the victim that in turn prompted the victim's attempt to shoot his assailants." Mendoza v. State, 700 So. 2d 670, 679 (Fla. 1997)(Anstead, Justice, concurring in part and dissenting in part).

**C. FAILURE TO RAISE ON APPEAL THE DENIAL OF PETITIONER'S MOTION FOR MISTRIAL MADE AFTER THE PROSECUTOR, DURING THE GUILT-INNOCENCE PHASE, TOLD THE JURY IT SHOULD CONVICT PETITIONER BASED ON THE FACT THAT THE JURY COULD THEREAFTER VOTE TO NOT RECOMMEND THE DEATH PENALTY.**

As a preliminary matter, the State curiously omits from its quotation of the prosecutor's offending statements to the jury the rather significant phrase, "**If you don't like the sentence, if you don't want to give him the death penalty, don't . . . .**" (TRT 1338);(See Amended Response p.8). Mr. Mendoza sets forth a full and accurate quotation in the Petition (See Petition p.19).

The State does not quarrel with the offending nature of the prosecutor's argument. Instead, the State contends that the prosecutor's imploring the jury to convict Mr. Mendoza based upon the fact that the jury could later vote to recommend life was invited error. The State suggests that the error was invited

in response to trial counsel's pointing out the disparate treatment between Mr. Mendoza and the co-defendants. Contrary to the State's position, trial counsel's arguments did not invite the prosecutor's error.

While certainly it was within the proper range of argument for the prosecutor to respond by pointing out why the State was treating Humberto differently than Mr. Mendoza (which the prosecutor did), trial counsel's argument in no manner invited the response at issue here. The prosecutor unequivocally told the jury that it could find Mr. Mendoza guilty and "adjust" for the unequal treatment between the co-defendants and Mr. Mendoza by not recommending the death penalty (TRT 1339). This was improper and not invited error. Cf. Lentz v. State, 498 So. 2d 986 (Fla. 1st DCA 1986)(new trial not required when prosecutor's closing argument remark to jury "did not state or imply that [the defendant] could 'get off' with light sentence so that the jury should not worry about finding him guilty.").

**D. FAILURE TO RAISE ON DIRECT APPEAL THAT THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY SPECIFICALLY TELLING THE JURY THAT THE JURY COULD PROPERLY SPECULATE AS TO WHY MR. MENDOZA ELECTED TO REMAIN SILENT AND BY SUGGESTING THAT MR. MENDOZA HAD THE BURDEN TO PROVE HIMSELF NOT GUILTY.**

The State makes merely a conclusory argument that "there was nothing improper about the trial court's comments" because "[t]he trial court's comments to the jury venire properly reflected the rights accruing to Defendant" (Amended Response at 12). Yet, the State does not even attempt to suggest why it is not a fairly susceptible comment on a defendant's right to remain silent when the presiding judge tells a capital case jury that there may be a number of reasons why somebody remains silent and does not testify, provides a list of possible reasons, including an "inability to remember the facts" or "the lawyers's recommendation not to testify", and then tells the jury that "[t]here is nothing wrong" with the jury wanting to hear from the defendant (TRT 285-6, 298). Nor does the State argue how a judge's comment suggesting that the jury must decide whether the defendant was "proven . . . not guilty" and a prosecutor's suggestion during argument to "[l]et [defense counsel] explain to you how it is that they have any evidence whatsoever that contradicts" the state's star witness (TRT 278, 1317) do not act to improperly shift the burden of proof.

This Court recently reviewed the law in this area:

A defendant has a constitutional right to decline to testify against himself in a criminal proceeding. See U.S. Const. amend. V; art.I, [s.]9, Fla. Const. Therefore, "any comment on, or which is fairly susceptible of being interpreted as referring to, a defendant's failure to testify is error and is strongly discouraged." State v. Marshall, 476 So. 2d 150, 153 (Fla. 1985); see also, e.g., Heath v. State, 648 So. 2d 660, 663 (Fla. 1994); State v. DiGuilio, 491 So. 2d 1129, 1131 (Fla. 1986). The "fairly susceptible" test is a "very liberal rule." DiGuilio, 491 So. 2d at 1135. This constitutional principle is also incorporated in Florida Rule of Criminal Procedure 3.250, which prohibits a prosecuting attorney from commenting on the defendant's failure to testify on his or her behalf.

Comments on a defendant's failure to testify can be of an "almost unlimited variety" and any remark which is "fairly susceptible" of being interpreted as a comment on silence creates a "high risk" of error. DiGuilio, 491 So.2d at 1135-36.

Rodriguez v. State, 753 So. 2d 29, 36-7 (Fla. 2000); see also State v. Kinchen, 490 So. 2d 21, 22 (Fla. 1985)(any remark which is "fairly susceptible" of being interpreted as a comment on a defendant's failure to testify is an impermissible violation of the constitutional right to remain silent). "[T]he Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." Griffin v. California, 380 U.S. 609 (1965).

For comment on the refusal to testify is a remnant of the "inquisitorial system of criminal justice," Murphy v. Waterfront Comm., 378 U.S. 52, 55 [ ], which the Fifth Amendment outlaws. [footnote omitted] It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly . . . What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another.

Griffin 380 U.S. at 614 (emphasis added).

The State's argument that the judge's comments had little or no effect on the jury because the comments "were made during the informal introductory portion of the trial in which the trial court addressed the jury venire informally" (Amended Response at 12) is without merit. The mere fact that the judge made these comments during voir dire is of no avail to the State. See Varona v. State, 674 So. 2d 823 (Fla. 4th DCA 1996); Harrell v. State, 647 So. 2d 1016 (Fla. 4th DCA 1994); Jackson v. State, 453 So. 2d 456, 458 (Fla. 4th DCA 1984).

To the extent the State suggests that the harm caused by the offending comments was nullified or reduced due to the judge's alleged "informal" manner (the State also refers to the judge's remarks as "conversational improvisation")(Amended Response at 12), the State is simply incorrect. "[E]ven cursory

references during voir dire to the right to remain silent are impermissible." Varona, 674 So. 2d at 825. Moreover, while the learned legal practitioner may recognize the judge's comments as "conversational improvisation", the jury had no reason to treat the comments with any less solemnity or significance than any other instruction by the judge. Here, the judge's comments were far from "cursory".

The State's reliance on Kiley v. State, 770 So. 2d 1278 (Fla. 4th DCA 2000) is not persuasive. The opinion in Kiley does not at all reveal the content of the trial judge's comments. See id. More telling is that the district court concluded in Kiley that, "[a]t no time did the court, in the context of discussing a defendant's right to remain silent, devalue or demean that right." Id. at 1279. In Mr. Mendoza's case, the judge's comments clearly devalued his right to remain silent by telling the jury that a defendant may choose not to testify because he "can't articulate" himself, has an "inability to remember the facts", or because his lawyer recommended that he not testify (TRT 285-6) and by telling the jury that "[t]here is nothing wrong with" wanting "to hear from him" (TRT 298).

In Varona, the prosecutor during voir dire told the jury that the defendant had a right to remain silent, did not have to testify if he did not want to and that the state could not compel him to testify. Varona, 674 So. 2d at 824. In finding the comments improper, the district court reasoned:

Because of the common belief that the innocent have nothing to hide, courts vigilantly protect the right to remain silent against devaluation by innuendo or faint praise. On voir dire, it is a defendant's prerogative -- not the prosecutor's -- to first broach with potential jurors the sensitive area of not taking the witness stand. This preference is reflected in the Florida Standard Jury Instructions in Criminal Cases. Both the preliminary and general instructions indicate that the charge on the right to remain silent is given not automatically, but if the "defendant requests." Fla. Std. Jury Instr. (Crim.) p.4, 19. [footnote omitted]

Set against this legal backdrop, the prosecutor's comments were improper in that they tended to demean a constitutional right and called undue attention to appellant's decision whether or not to testify. The prosecutor's words spilled far over the line of propriety drawn by the cases quoted above.

Varona at 825. The judge's comment in Mr. Mendoza's case are far more demeaning and devaluing in nature than the comments by the prosecutor in Varona. Moreover, the fact that the presiding judge made these comments makes the comments far more harmful than had the comments been made by the prosecutor. The jury is taught that it is the duty of the court to explain the law to the jury. See Fla. Std. Jury Instr. 1.01 (Crim.). The egregious nature of the comments was not overcome by the trial court's other "proper" instructions regarding Mr. Mendoza's right to remain silent and the burden of proof.

The State misconstrues Mr. Mendoza's argument with respect to the prosecutor's comment urging the defense to "explain to you [the jury] how it is that they have any evidence whatsoever that contradicts what Humberto Cuellar told you and that you should believe Humberto Cuellar" (TRT 1319). Mr. Mendoza does not claim that this error alone entitles him to relief. Instead, this impermissible comment by the prosecutor contributed to the cumulative effect on the fairness of the proceedings in conjunction with the judge's improper comments.

As to the merits of the propriety of the prosecutor's comment, the State incorrectly argues that the comment "merely underscored that no evidence had been presented that contradicted Humberto's testimony" and, per the State, was a fair comment upon the evidence (Amended Answer at 15). Contrary to the State's contention, this was not simply a comment on the evidence, it was a comment asking the jury to shift the burden to produce evidence to Mr. Mendoza -- "Let [defense counsel] explain to you how it is **that they have any evidence whatsoever that contradicts** what Humberto Cuellar told you and that you should believe Humberto Cuellar." (TRT 1319)(emphasis added). The "they" referred to by the prosecutor is the defense. The jury naturally and reasonably would have interpreted the prosecutor's comment as

asking the jury to place the burden on the defense to produce evidence that "contradicts" Humberto's testimony. See Jackson v. State, 575 So. 2d 181, 188 (Fla. 1991); see also Hayes v. State, 660 So. 2d 257, 265 (Fla. 1995).

**E. FAILURE TO RAISE PETITIONER'S DETRIMENTAL RELIANCE ON THE TRIAL COURT'S MID-TRIAL REVERSAL OF ITS PRE-TRIAL RULING ON THE ISSUE OF THE VICTIM'S INVOLVEMENT IN "BOLITO".**

The State first asserts that there was no prejudice caused by the trial court's prohibiting the defense from presenting evidence that the victim was involved in bolito because the issue is irrelevant since, according to the State, the fact that the men intended merely to collect a bolito debt from the victim is not a defense to the charge of robbery. Contrary to the State's argument, the common law claim-of-right defense to the crimes of robbery and theft has not been abrogated in Florida. Because evidence that Mr. Mendoza and the co-defendants were seeking to collect a debt owed by the victim negates the specific intent required to prove the alleged underlying offenses of attempted robbery and burglary (by negating the specific intent to commit theft), the State's argument should be rejected. See this Reply, Claim B, supra, p.1; Reply Brief, Case No. SC01-735, pp.1-8).

The State next contends that the trial court never ruled that the defense could not present evidence that the victim was a bolitero. The State overlooks the fine detail of the court's rulings. The issue at hand does not involve the trial court's ruling that the defense could not present the specific evidence of the victim's prior arrest and withhold of adjudication for bolito. As set forth fully in the Petition, the point is that, while the court so ruled pre-trial, the court also ruled pre-trial that the defense could present other evidence that the victim was a bolitero. The court did not limit its ruling only to evidence that the victim was a bolitero **at the time of his death**. Subsequently, midtrial, the court re-visited the issue and, at that time, limited its

ruling to allowing only evidence showing that, at the time of his death, the victim was involved in bolito. This mid-trial change in its ruling prejudiced the defense because the defense promised the jury that evidence would show that the victim had been involved in bolito, yet, because of the trial court's mid-trial change in its ruling, the defense could not do so. The mere fact that Humberto testified that Mr. Mendoza told him the victim was a bolitero does not render the trial court's actions without prejudice. Defense counsel proffered that he had several witnesses who knew that the victim, prior to the time of his death, had been involved in bolito (TRT 758, 797, 801, 804-5). Because of the trial court's midtrial change in its ruling, the defense could not present this evidence.

**G. FAILURE TO RAISE ON DIRECT APPEAL THAT FUNDAMENTAL ERROR OCCURRED DUE TO THE STATE'S IMPROPER INTRODUCTION OF AND ARGUMENT ON NON-STATUTORY AGGRAVATING FACTORS.**

The State does not respond to Mr. Mendoza's argument that the combination of the prosecutor's argument quoted in the Petition amounted to a "safety of the community/future dangerousness" non-statutory aggravating factor (Petition at 34). Mr. Mendoza acknowledges that this Court on direct appeal considered the prosecutor's argument during the penalty phase that the jury should consider the pending robbery charges as a basis to recommend that the court order Mr. Mendoza's execution. The Court indeed found that the prosecutor's argument was improper however, based on the record and arguments before it at the time, found the error harmless. See Mendoza v. State, 700 So. 2d 670, 675-8 (1997). Mr. Mendoza submits, however, that this Court should re-access this finding of harmless error in light of all the additional errors, preserved and unpreserved, including fundamental error, raised in the instant Petition. See Martinez v. State, 761 So, 2d 1074, 1082 (Fla. 2000).

**I. FAILURE TO RAISE THAT FUNDAMENTAL ERROR OCCURRED WHEN THE PROSECUTOR'S ARGUMENTS AND THE TRIAL COURT'S STATEMENTS AT THE GUILT/INNOCENCE AND PENALTY PHASES PRESENTED IMPERMISSIBLE CONSIDERATIONS TO THE JURY, MISSTATED THE LAW AND FACTS, AND WERE INFLAMMATORY AND IMPROPER.**

**Guilt-Innocence Phase**

As for the prosecutor's unequivocal personal attack on trial counsel in which the prosecutor explicitly told the jury that counsel intentionally presented false evidence ("[trial counsel] put that [witness] in front of you to try to confuse and mislead you to (sic) based an opinion on something that is not true.")(TRT 1302-3); ("[trial counsel] purposely put it on to mislead you because they knew the right time.")(TRT 1318-9)(emph. added)), the State argues that these comments were a "fair comment on the evidence adduced at trial" (Amended Response at 29). The State argues that the prosecutor's personal attack was justified because the State's witness, Gallagher, testified on rebuttal that he had stated in his deposition that the swabs were taken prior to 9:00 a.m. and, therefore, implied that Criminalist Rao's report was in error (Amended Response at 30). The State's argument fails because the mere fact that there was a discrepancy between two police department employees as to the time the swabs were taken does not justify the prosecutor's personal attacks and accusations of intentional misrepresentation and deception.

In Brooks v. State, 762 So. 2d 879 (Fla. 2000), the prosecutor's personal attack on defense counsel was far less blatant and egregious than the attacks in the instant case, yet, there, the Court held that the remarks "transcended the bounds of legitimate comments on the evidence and implied that the jury could not believe defense counsel or the arguments asserted by them." See id. at 904-5. The Court agreed that the attack in Brooks constituted an improper personal attack on counsel and counsel's credibility. See id. at 904. Under the authority of Brooks, as well as the cases cited therein (see DelRio v. State, 732 So.

2d 1100 (Fla. 3d DCA 1999); Redish v. State, 525 So. 2d 928 (Fla. 1st DCA 1988); Fryer v. State, 693 So. 2d 1046 (Fla. 3d DCA 1997)), the prosecutor's attacks in the instant case were improper and in no manner justified. See also Gore v. State, 719 So. 2d 1197 (Fla. 1998).

Moreover, even if the prosecutor had a legitimate complaint as to trial counsel's tactics (though she did not), it was still improper for her to attack counsel in front of the jury. The proper method to handle such a situation would have been to address the matter outside the presence of the jury, possibly requesting some form of relief or sanctions from the court and to file a complaint with the Florida Bar.

As for the State's response to the prosecutor's misconduct in telling the jury during the guilty-innocence phase that the jury should consider the fact that the jury could later vote to recommend a life sentence and in shifting the burden of proof, as well as the trial court's improper instructions to the jury that shifted the burden of proof and unconstitutionally infringed on Mr. Mendoza's right to remain silent, Mr. Mendoza relies on his reply to these responses set forth in Claims C and D. See supra pp.2-7.

### **Penalty Phase**

The State contends that the prosecutor's comments were justified as "an appropriate comment on the evidence presented at the penalty phase" (Amended Response at 39). The State's position is simply untenable under the authority of Brooks in light of the totality of the prosecutor's comments, including her comments in which she repeatedly referred to the offered mitigation as "excuses" (TRT 1674, 1657, 1658) and suggested that the jury should consider Dr. Toomer's testimony that Mr Mendoza succumbed to crack cocaine, marijuana and alcohol in order to self-medicate his mental problems, not as mitigation, but as "**garbage**" (TRT 1660). See Brooks at 903-4; see also Gore.

The cumulative effect of the entirety of the prosecutor's and the trial court's improper conduct in both the guilt-innocence and penalty phases rises to the level of fundamental error such that had appellate counsel raised this issue on direct appeal, this Court would have granted him a new trial. At the very least, when viewed in conjunction with the jury's borderline seven to five vote to execute Mr. Mendoza, this Court would have remanded this case for a new penalty phase. See Brooks at 905.

#### CONCLUSION

For the reasons set forth above, Mr. Mendoza respectfully requests this Court to grant him a new direct appeal and, thereafter, remand for a new trial, or, in the alternative, a new sentencing proceeding.

#### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first-class postage prepaid, to Lisa Rodriguez, Office of Attorney General, Rivergate Plaza, Suite 950, 444 Brickell Avenue, Miami, FL 33131-2407, on December 13, 2001.

#### CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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DAN D. HALLENBERG  
Florida Bar No. 940615  
Assistant CCRC-South  
101 N.E. 3rd Ave., Ste. 400  
Fort Lauderdale, FL 33301  
(954) 713-1284  
Attorney for Mr. Mendoza

Copies furnished to:

Lisa Rodriguez  
Office of Attorney General  
Rivergate Plaza, Suite 950  
444 Brickell Avenue  
Miami, FL 33131-2407